

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20037
MAIN TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

William A. Mullins
wmullins@bakerandmiller.com

DIRECT DIAL: (202) 663-7823

November 15, 2004

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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Public Record

RE: Finance Docket No. 34335
Keokuk Junction Railway Co.--Feeder Railroad Development Application
--Line Of Toledo, Peoria & Western Railway Corporation Between
LaHarpe And Hollis, IL

Dear Secretary Williams:

Enclosed herewith are an original and eleven copies of the "Reply of Keokuk Junction Railway Co. To The Petition Of Toledo, Peoria and Western Railway Corporation For An Extension Of Time To File Its Petition For Reconsideration" filed on November 15, 2004. Please acknowledge receipt of the enclosed pleading by date stamping the extra copy of the filing and returning it to the individual making this filing for return to me. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosure

cc: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34335

**KEOKUK JUNCTION RAILWAY CO.
--FEEDER RAILROAD DEVELOPMENT APPLICATION--
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION
BETWEEN LA HARPE AND HOLLIS, IL**

**REPLY OF KEOKUK JUNCTION RAILWAY CO. TO THE PETITION OF TOLEDO,
PEORIA AND WESTERN RAILWAY CORPORATION FOR AN EXTENSION OF
TIME TO FILE ITS PETITION FOR RECONSIDERATION**

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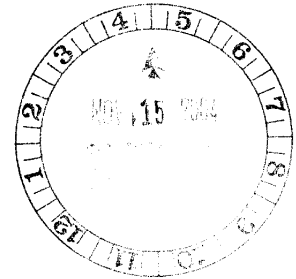
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**William A. Mullins
David C. Reeves
BAKER & MILLER, PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

Attorneys for Keokuk Junction Railway Co.

DATED: November 15, 2004



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34335

**KEOKUK JUNCTION RAILWAY CO.
--FEEDER RAILROAD DEVELOPMENT APPLICATION--
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION
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**REPLY OF KEOKUK JUNCTION RAILWAY CO. TO THE PETITION OF TOLEDO,
PEORIA AND WESTERN RAILWAY CORPORATION FOR AN EXTENSION OF
TIME TO FILE ITS PETITION FOR RECONSIDERATION**

Keokuk Junction Railway Co. ("KJRY"), applicant in this proceeding, hereby replies to the petition for an extension of time filed by Toledo, Peoria, and Western Railway Corporation ("TP&W") on November 15, 2004. The petition should be denied.

TP&W's petition alleges two grounds for seeking a 20-day extension of the due date to file a petition for reconsideration: (1) an alleged need to allow newly-hired witnesses more time to file new evidence in order to rebut the Board's findings on the value of TP&W's title to right-of-way real estate; and (2) a need to respond to the information filed by a shipper in support of KJRY's reply to TP&W's stay petition. Neither of these is grounds for extending TP&W's deadline.

In seeking reopening and reconsideration, a party may only rely on new evidence, not evidence that was previously available but that it did not submit. *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42056, 2004 STB LEXIS 597 * 5 (STB served Sept. 27, 2004) ("[T]he term 'new evidence' refers to evidence that was not reasonably available to the party when the record was developed.>").

TP&W's assertion that it will offer new evidence prepared by newly hired real estate experts who have not been given enough time to complete their work does not meet this standard.

TP&W's October 2003, two-volume evidentiary filing addressed TP&W's alleged title to the right-of-way real estate in question and was submitted in part to rebut KJRY's evidence of real estate valuation that was contained in KJRY's Application. At the time of its October filing, TP&W knew that the quality of its title to the real estate was at issue. In preparing its October 2003 filing, TP&W could have hired these very same experts or any experts with respect to land title issues in Illinois, but it didn't do so. Instead, TP&W offered only the right-of-way title assessment of RailAmerica's Texas-based corporate officer in charge of real estate. That was TP&W's choice.

Of course now that KJRY has carried the burden of proof on the right-of-way title issue and the Board has ruled based upon the evidence of record, TP&W is unhappy with the results and wants another chance to submit additional rebuttal evidence, and they even want additional time to do so. The Board should reject this approach. The evidence TP&W seeks to submit was undoubtedly previously available. As such, the Board should not grant additional time to prepare previously available evidence.

Furthermore, even if the experts were not available when TP&W made its October 2003 filing, TP&W should not now be given additional time to prepare its reconsideration petition. TP&W has known about the real estate valuation issue for a long time and easily could have retained these or other experts at any time over the course of this proceeding. It didn't do so because TP&W was satisfied last year with the evidence presented by its corporate officer in charge of real estate, and stood on that evidence, until the Board found it unpersuasive. Now, unhappy with the Board's decision, it wants to hire new experts and file new rebuttal evidence.

However, the Board should not grant an extension request when TP&W has known about this issue throughout this proceeding. *Central Power & Light Company v. Southern Pacific Transportation Company*; *Pennsylvania Power & Light Company v. Consolidated Rail Corporation*; *MidAmerican Energy Company v. Union Pacific Railroad Company And Chicago And North Western Railway Company*, STB No. 41242, No. 41295, No. 41626 (STB served Sept. 18, 1996 (denying AAR's motion for an extension of time because railroads have been on notice of the issues involved in these proceedings for several months)).

Granting TP&W an extension on the grounds that it needs time to prepare and file new evidence to rebut long standing issues in the context of a petition for reconsideration would also simply create a never-ending procedural morass where, whichever party loses at the first stage of a proceeding, seeks to retry the proceeding with new evidence on reconsideration. The Board should not approve of such an approach.¹

TP&W's second contention that it needs additional time to address information submitted in KJRY's filing of November 12 is equally meritless. KJRY's November 12 filing responded to TP&W's petition for stay. The Board's rules do not provide for the submission of rebuttal evidence to support a stay petition. Yet that is exactly what TP&W is requesting – additional time to respond to KJRY's response to TP&W's stay petition. As with its request for extension to submit "new" real estate title evidence that it should have submitted last October, TP&W is in essence saying that because it failed to submit persuasive evidence supporting a stay, it should be

¹ *Accord, Burlington Northern Inc. and Burlington Northern Railroad Company – Control and Merger – Santa Fe Pacific Corporation And The Atchison, Topeka and Santa Fe Railway Company*; *Keokuk Junction Railway – Trackage Rights and Terminal Access On Certain Line Of Burlington Northern Railroad Company In Iowa, Missouri, and Illinois*, F.D. No. 32549 (Sub-No. 17)(ICC served June 16, 1995)(denying KJRY's request for an extension of time in order to respond to evidence produced by TP&W).

allowed additional time to come up with different reasons for overturning the Board's decision.

Such an assertion is completely meritless.

As KJRY stated in its November 12 response to TP&W's stay petition, TP&W's *modus operandi* throughout this proceeding has been to seek delay. They have done so again. Further delay only hurts every former and potential shipper who may use the Line by delaying the availability of service and making more difficult the necessary track rehabilitation. Rail American is a very sophisticated company represented by competent counsel, as such, the Board's normal time deadlines to prepare and file a petition for reconsideration are more than sufficient. The Board should deny TP&W's extension request.

Respectfully submitted,



William A. Mullins
David C. Reeves
BAKER & MILLER, PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

Attorneys for Keokuk Junction Railway Co.

November 15, 2004

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2004, I have caused the "Reply of Keokuk Junction Railway Co. To The Petition Of Toledo, Peoria and Western Railway Corporation For An Extension Of Time To File Its Petition For Reconsideration" to be served by courier on:

Louis E. Gitomer
BALL JANIK LLP
1455 F Street, NW
Suite 225
Washington, DC 20005

and

Gordon P. MacDougall
1025 Connecticut Ave., NW
Washington, DC 20036

Brooke L. Gaede
Steptoe & Johnson, LLP
1330 Connecticut Ave., NW
Washington, DC 20036-1795

and by first class mail or more expeditious service on other parties of record.


William A. Mullins
Attorney for Keokuk Junction Railway Co.